

Resolution No.: 15-1722  
Introduced: October 17, 2006  
Adopted: November 28, 2006

**COUNTY COUNCIL  
FOR MONTGOMERY COUNTY MARYLAND**

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By: Management and Fiscal Policy Committee

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**SUBJECT:** Grant of License Agreement for the Use of Public Right-of-Way for  
1203 Fidler Lane, LLC

**Background**

1. Sections 49-11 and 49-12 of the County Code provide that the County Council may grant a franchise or right for the use of the public right-of-way after:
  - a) the applicant publishes the application once a week for three consecutive weeks in a newspaper of general circulation in the County;
  - b) the County Executive makes “diligent inquiry” into the value of the franchise or other right and the adequacy of the proposed compensation the applicant will pay to the County;
  - c) the Executive holds a hearing on the application if any taxpayer or affected property owner objects to the franchise within 10 days after publication of the application;
  - d) the Executive makes a written recommendation to the Council about the franchise or other right, including a description of the application and any objections to it, findings about the value of the franchise or other right, and any other relevant matters; and
  - e) the Council decides that the franchise or other right is expedient and proper.
2. On September 19, September 26, and October 3, 2006, 1203 Fidler Lane, LLC published notice of its application for a license agreement to use the public right-of-way. The Executive received no objection to the application by the October 13, 2006 deadline, and thus was not required to conduct a hearing on the franchise application.
3. On October 13, 2006, the Council received the Executive’s recommendation to grant a license agreement to 1203 Fidler Lane, LLC and a proposed license agreement.

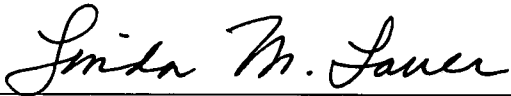
4. On November 28, 2006, the Council held a public hearing on the proposed license agreement.
5. On November 13, 2006, the Council's Management and Fiscal Policy Committee considered the license agreement and recommended that the Council approve the license agreement provided that no new issues emerged at the public hearing.

**Action**

The County Council for Montgomery County Maryland approves the following resolution:

The County Council finds that granting a license agreement to 1203 Fidler Lane for use of the public right-of-way is expedient and proper. The Council approves the use of the County's right-of-way under the terms of the attached license agreement dated November 28, 2006.

This is a correct copy of Council action.

A handwritten signature in cursive script, reading "Linda M. Lauer", written in dark ink.

Linda M. Lauer, Clerk of the Council

## LICENSE AGREEMENT

MONTGOMERY COUNTY, MARYLAND, a body corporate and politic of the State of Maryland (hereafter the "County"), and 1203 Fidler Lane, LLC, a Maryland limited liability company on behalf of itself, its successors and assigns (hereafter "Licensee") enter into this License Agreement ("Agreement") this \_\_\_\_ day of \_\_\_\_\_, 2006.

### RECITALS

**WHEREAS**, Montgomery County Code 2004 as amended, §49-11 provides that no right in relation to any highway, avenue, street, lane or alley, either on, above or below the surface of the same, shall be granted by the County Council other than in accordance with the requirements of §§49-11 *et seq.*; and

**WHEREAS**, Licensee is the fee owner of certain land to be known as "Lot 12, Fidler's Subdivision" per a record plat to be recorded in the Land Records of Montgomery County (the "Property") which is proposed to be improved with a residential condominium development (the "Private Improvements"), a portion of which will include a private underground parking garage (the "Private Garage"); and

**WHEREAS**, the County owns a certain public right-of-way commonly known as Fidler Lane which abuts the Property and contains 2,275 square feet (the "Existing Public Right-of-Way") with a FAR calculation of 3,412.5 square feet; and

**WHEREAS**, the Licensee is required to dedicate a portion of the Property adjacent to the Existing Public Right-of-Way containing 1,750 square feet (the "Dedicated Public Right-of-Way") (collectively, the Existing Public Right-of-Way and the Dedicated Public Right-of-Way are hereinafter referred to as the "Subject Public Right-of-Way"); and

**WHEREAS**, Licensee wishes to construct and maintain a portion of the Private Garage as shown on Exhibit "A" within the Subject Public Right-of-Way (the "License Area"); and

**WHEREAS**, Licensee has made application to the County for a license (the "License") to construct, install, operate, and maintain the Private Garage within the License Area pursuant to Section 49-11 *et seq.* of the Montgomery County Code 2004, as amended; and

**WHEREAS**, Licensee has caused said License application to be published once a week for three consecutive weeks in one or more newspapers having general circulation in the County, setting forth the location, character and extent of the license sought, and stating the terms and compensation to be received therefore; and

**WHEREAS**, the County has determined and Licensee agrees that the consideration required for the license for use of the Existing Public Right of Way is Fifty-seven and 50/100 Dollars (\$57.50) per FAR Foot for a total consideration of \$196,218.75 (the "License Fee") based on the FAR calculation for the Existing Public Right-of-Way of 3,412.5 square feet.

NOW, THEREFORE, for good and valuable consideration, the receipt and sufficiency of which are hereby acknowledged, this License Agreement is entered into by and between the parties subject to the following terms and conditions:

**1. DEFINITIONS.**

For the purposes of this Agreement, the following words, terms, phrases, and their derivations shall have the meanings given herein. The word "shall" is always mandatory.

1.1 "Effective Date" of this Agreement means the date this Agreement is executed by the County.

1.3 "Facilities" means that portion of the Private Garage located under the public sidewalk in the Subject Public Right-of-Way.

1.4 "Law" means any judicial decision, statute, constitution, ordinance, resolution, regulation, rule, tariff, administrative order, certificate, order, or other requirement of the Federal Government, State, or County, or other Agency having joint or several jurisdiction over the parties to this Agreement, in effect either on the Effective Date or at any time during the presence of the Facilities in the Public Right-of-Way.

1.5 "License Area" means that area of the Subject Public Right-of-Way proposed for construction of the Private Garage as shown on Exhibit "A".

1.6 "Licensee" means 1203 Fidler Lane, LLC. If the Property is subjected to a condominium regime pursuant to Title 11 of the Real Property Article of the Annotated Code of Maryland, the term "Licensee" shall thereafter refer solely to the Council of Unit Owners of said condominium regime and 1203 Fidler Lane, LLC as an entity shall have no further obligation under this Agreement except for those obligations set forth in Section 5.3 below and any unperformed obligations that this Agreement requires to be performed before the Property is subjected to the condominium require (the "Residual Developer Obligations").

1.7 "Person" means an individual, a corporation, a limited liability company, a general or limited partnership, a sole proprietorship, a joint venture, a business trust, and any other form of business association or organization of any kind.

1.8 "Property" means a parcel of land to be known as "Lot 12, Fidler's Subdivision" on a record plat to be recorded among the Land Records of Montgomery County.

1.9 "Subject Public Right-of-Way" means that portion of the right-of-way that projects approximately 12 feet, 11 inches from the Property line, including the Dedicated Public Right of Way once dedicated to the County by the Licensee, and which is comprised entirely of sidewalk at the surface level. Subject Public Right-of-Way for purposes of this License Agreement does not include any portion of the public right-of-way beyond the curbline separating the sidewalk from the street, and there is no permission hereunder for any encroachment to extend beyond the curbline of the sidewalk as shown in Exhibit "A".

1.10 "Record Plat" shall mean that certain record plat filed pursuant to Preliminary

Plan No. 1-04040A.

1.11 "1203 Fidler Lane, LLC" means a Maryland limited liability company duly organized under the laws of Maryland, and its lawful successors, assigns, and transferees.

## 2. TERM.

This Agreement grants to Licensee permissive use of the License Area and which permission may continue until terminated by either party in accordance with the provisions herein, and shall commence on the Effective Date.

## 3. SCOPE OF LICENSE.

3.1 The permission expressly granted to Licensee under this Agreement shall be exercised at Licensee's sole cost and expense and is expressly subject to the right of the County and of public utilities to use any and all parts of the License Area exclusively or concurrently, with any other Person or Persons as may be allowed under the Law or by the County. Nothing in this Agreement shall be deemed to grant, convey, create, or vest a perpetual real property interest in land in Licensee, including any fee, leasehold interest, or easement. The County makes no representations or warranties with respect to the title to the Subject Public Right-of-Way, the nature of the County's interest in the Subject Public Right-of-Way, or the location of any utilities or other improvements within the Subject Public Right-of-Way, generally or the License Area specifically. To the extent that there are other interests or improvements, if any, in the License Area, Licensee must obtain the necessary consent for its use from each Person who holds any such interest and must either not disturb or provide for the acceptable relocation of any such improvement at its sole cost and expense. Licensee assumes the risk of damage to the Private Garage by installing the Private Garage underneath the Subject Public Right-of-Way and expressly waives any claim that it or its successors might have due to work on or in the Subject Public Right-of-Way.

3.2 The County hereby grants a non-exclusive right and license to Licensee to construct, install, operate, maintain, and repair, the Private Garage within the License Area, in accordance with the Law, at the locations and in the manner specified herein and in Exhibit "A".

3.3 Except as permitted by applicable Law or this Agreement, in the performance and exercise of its rights and obligations under this Agreement, the Facilities within the License Area shall not interfere in any manner with the existence and operation of any and all public and private rights-of-way, sanitary sewers, water mains, storm drains, gas mains, poles, aerial and underground electric and telephone wires, electroliers, cable television, and other telecommunications, utility, and County or municipal property without the express written approval of the owner or owners of each affected property. If Licensee proposes to relocate any such utility, the relocation of any of the utilities shall be outside of the roadbed of the County's right-of-way and shall be subject to the approval of said utility company.

3.4 Licensee shall comply with all applicable Law in the exercise and performance of its rights and obligations under this Agreement. Licensee hereby acknowledges that the rights granted by this Agreement are subject to the police powers of the County.

3.5 Licensee represents and agrees that the Facilities subject to this Agreement will be used exclusively for the purpose of providing a portion of the below-grade private parking. Licensee agrees that no structural support for the Private Improvements or the Private Garage shall be located within the Subject Public Right-of-Way.

3.6 Licensee shall pay the License Fee to the County within three days of execution of this Agreement by the County.

#### **4. REPAIR AND REMOVAL OF FACILITIES.**

4.1 Following substantial completion of the Private Garage and before occupancy of the Private Garage and every other year thereafter, Licensee shall, at its sole cost and expense, cause a structural engineer licensed in the State of Maryland to inspect the Private Garage no later than January 31 of each such calendar year thereafter in accordance with the standards set forth in the County's bridge inspection program and such engineer must certify to the County that the Private Garage is structurally sound and in a good state of repair. If the County does not have a bridge inspection program, the inspection shall be conducted in accordance with Federal National Bridge Inspection Standards or similar standards as may be required by the County's Department of Public Works and Transportation. In the event it is determined by the structural engineer that the Private Garage is not structurally sound or in a good state of repair, Licensee shall promptly provide the County with a description of the necessary repairs and a cost estimate for such repairs. Licensee shall provide the County with a performance bond from a reputable and duly registered issuer of bonds in form, substance and amount reasonably acceptable to the County to secure the full and proper performance of the necessary repairs, which bond will be released upon the completion of such repairs. Licensee shall, at its sole cost and expense, commence such repairs or take whatever action is necessary to cause the Private Garage to be structurally sound and in good repair and in compliance with all applicable building codes and requirements including the 2003 International Building Code, Chapter 32, as such provisions may be amended or replaced. If Licensee fails to cause such repairs to be promptly made, the County after thirty days notice, or such shorter notice as may be necessary due to an emergency, may have such repairs made to the Private Garage or, in its discretion may terminate this Agreement and close off and remove the Private Garage at the point at the Property line. The County may use the aforementioned performance bond to secure and pay for such work. Licensee herein grants the County and its contractors a right of entry to the Private Garage for the purpose of performing such work. Upon the receipt of a demand for payment by the County, Licensee shall reimburse the County for such costs and such costs that have not previously been paid under the performance bond.

4.2 Licensee shall upon execution of this Agreement post a performance bond or irrevocable letter of credit, either of which must be in form and substance reasonably acceptable to the County and issued by an issuer reasonably acceptable to the County, in the amount of Ten Thousand Dollars (\$10,000) to secure the cost of and performance of the required structural inspections. If Licensee shall fail to provide the County with the structural certification required pursuant to Section 4.2 (an "Inspection Default"), the County may, upon written notice to Licensee, require that Licensee within 30 days after receipt of said notice cure the Inspection Default by providing said structural certification to the County (in which case said Inspection Default shall be deemed expunged and thereupon said Inspection Default shall not be deemed to

have occurred for purposes of this sentence). If Licensee fails to cure the Inspection Default within the cure period the County may draw against the bond or letter of credit to obtain the structural inspection and certification. In the event Licensee thereafter fails to promptly restore the full bond or letter of credit as herein required, the County may terminate this Agreement and pursue all remedies available under this Agreement or otherwise available in law or equity.

**4.3** Prior to performing any work on the Private Garage in the License Area, Licensee shall notify the County of such work being performed. If such work has the potential to impact upon the Subject Public Right-of-Way, the County may require Licensee to post a bond or irrevocable letter or credit in form and substance, and from an issuer reasonably acceptable to the County and in an amount to secure costs of restoration of any damage to the Subject Public Right-of-Way prior to commencing such work. Whenever the construction, reconstruction, installation or removal of the Private Garage is performed by or on behalf of Licensee under this Agreement, and such construction, reconstruction, installation or removal shall cause the Subject Public Right-of-Way to be damaged, Licensee, at its sole cost and expense, shall promptly obtain permits for and commence and duly and diligently repair and return the Subject Public Right-of-Way that has been damaged to a good condition and state of repair in accordance with Law. The County shall have the option to perform or cause to be performed such reasonable and necessary work on behalf of Licensee and charge Licensee for the costs incurred by the County (third party and county staff costs, along with materials and other costs). Upon the receipt of a demand for payment by the County, Licensee shall reimburse the County for such costs and such costs shall be a priority lien against the Private Improvements in the nature of a tax lien, until such payments shall be made. Payments not made within thirty days of invoice shall accrue interest at the same rate as applies to unpaid and overdue taxes.

**4.4** Licensee agrees as a condition of the County entering into this Agreement, that it hereby waives on behalf of itself and its successor-in-interest to all or any portion of the Private Garage or Private Improvements that if the County shall need the Subject Public Right-of-Way for public improvements, the permission to use the License Area shall terminate and the County may at its expense seal off and remove that portion of the Private Garage within the License Area and Licensee and its successors-in-interest shall not be entitled to any right to any payment for damages, severance or otherwise, related to or arising out of loss of use of the License Area.

## **5. CONSTRUCTION PERMIT AND PERFORMANCE SECURITY.**

**5.1** Licensee shall apply for the appropriate permits required by Law to accommodate the construction, reconstruction, installation, maintenance, repair or removal of the Facilities in the Subject Public Right-of-Way. Licensee shall perform such construction work in a good workmanlike manner and as required by the permits, this Agreement and in accordance with all applicable Law.

**5.2** Within thirty (30) days of the completion of any construction, reconstruction, installation or removal, or sooner if requested by the County, Licensee promptly shall furnish to the County, in hard copy and electronic format or other format reasonably acceptable to the County, suitable documentation containing a full set of drawings showing, in detail, the exact location of the Facilities in the Subject Public Right-of-Way.

5.3 Prior to exercising any permission provided hereunder, and as required in connection with the applicable Stormdrain, Grading, Paving or other such permit, Licensee shall deposit with the County an irrevocable letter of credit or completion bond in form and substance acceptable to the County securing the full and faithful performance of completion of the Private Garage in the License Area and restoration of any damage to the Subject Public Right-of-Way.

## 6. INDEMNIFICATION AND WAIVER.

6.1 Licensee hereby agrees, covenants, and warrants to protect, indemnify, and hold the County and its respective officers, members, employees, contractors and agents (collectively, the "Indemnified Parties") harmless from and against all liabilities, actions, damages, claims, demands, judgments, losses, costs, expenses, liens, encumbrances, suits or actions and reasonable attorneys' fees, and the cost of the defense of the Indemnified Parties in any suit, including appeals, arising out of, or relating in any manner to all work or obligations undertaken by Licensee pursuant to this Agreement, activities resulting therefrom and/or as a result of Licensee's, or its contractors, subcontractors, agents, employees or invitees presence on, access to, or activities on or about the Subject Public Right-of-Way.

6.2 The waiver by either party of any breach or violation of any provision of this Agreement shall not be deemed to be a waiver or a continuing waiver of any subsequent breach or violation of the same or any other provision of this Agreement.

6.3 Licensee acknowledges that its use of the Subject Public Right-of-Way is permissive and at its own risk and that the County is not, and will not be, liable for any damage to the Private Garage resulting from any work by the County, its agents, employees or contractors in or upon the Subject Public Right-of-Way (except to the extent caused by or arising from the gross negligence or willful misconduct of the County). Licensee waives any and all claims, demands, causes of action, and rights it may assert against the County on account of any loss, damage, or injury to the Private Garage caused by or arising from the installation, maintenance, replacement, or relocation of any County-owned facility in the Subject Public Right-of-Way (except to the extent caused by or arising from the gross negligence or willful misconduct of the County), or an Act of God, an event or occurrence which is beyond the reasonable control of the County, a power outage, or a lightning strike. Nothing herein shall be construed to waive the County's governmental immunity.

## 7. INSURANCE.

7.1 Licensee shall obtain and maintain at all times during the term of this Agreement comprehensive general liability insurance and comprehensive automotive liability insurance protecting Licensee as shown on Exhibit "B" attached hereto.

7.2 Licensee's insurance is primary to any other valid or collectible insurance that the County may possess, including any self-insured retentions the County may have, and any other insurance the County does possess shall be considered excess insurance only and shall not be required to contribute with this insurance.

The certificate(s) of insurance with endorsements and notices, shall be mailed to:



Chief, Division of Operations, MCDPWT  
Montgomery County, Maryland  
Executive Office Building  
101 Monroe Street  
Rockville, Maryland 20850

7.3 The insurance may not be canceled or materially modified, without the insurer first providing 45 days advance written notice to the County.

7.4 Any deductibles or self-insured retentions must be stated on the certificate(s) of insurance, which shall be sent to and approved by the County prior to the execution of this Agreement.

## 8. NOTICES.

8.1 A notice or communication under this Agreement by or between the County and Licensee shall be sufficiently given or delivered if dispatched by either (a) certified mail, postage prepaid, return receipt requested, (b) nationally recognized overnight delivery service, or (c) hand-delivery (if receipt is evidenced by a signature of the addressee or authorized agent), and addressed:

County:

Chief Administrative Officer  
Executive Office Building  
101 Monroe Street  
Rockville, Maryland 20850

With a copy to:

County Attorney  
Office of the County Attorney  
101 Monroe Street, Third Floor  
Rockville, Maryland 20878

And

Director, Department of Public Works and Transportation  
101 Monroe Street  
Rockville, Maryland 20850

Licensee:

1203 Fidler Lane, LLC  
c/o The Patriot Group  
Mr. Leith Wain  
1003 K Street, NW, Suite 207  
Washington, DC 20001

Notices shall be deemed given upon receipt in the case of personal delivery; three (3) days after deposit in the mail; or the next day in the case of overnight delivery. Either party may from time to time designate any other address for this purpose by written notice to the other party in the

manner set forth above. All notices and approvals required in this Agreement must be in writing to bind the submitting or receiving party.

Licensee is a Maryland limited liability company, duly registered to do business in the State of Maryland with the following designated resident agent:

Mr. Leith Wain  
13211 Valley Drive  
Rockville, Maryland 20850

## **9. TERMINATION AND DEFAULT.**

**9.1** Except as otherwise provided herein, this Agreement may be terminated by either party upon ninety (90) days' prior written notice to the other party upon a default of any material covenant or term hereof by the other party, which default is not cured within such ninety (90) days of receipt of written notice of default (or, if such default is not curable within ninety (90) days, if the defaulting party fails to promptly commence and duly and diligently pursue such cure to completion), provided that the grace period for any monetary default (e.g., failure to pay any sums owed to the County hereunder) is thirty (30) days from receipt of written notice to Licensee.

**9.2** Upon the occurrence of a default by Licensee of its obligations under this Agreement, and after the expiration of the applicable notice and cure periods set forth in Section 10.1 above (or as otherwise provided in this Agreement), the County may (but is not obligated to) revoke the License or seek such other remedies as may be available to it under law or equity, including without limitation injunctive relief, mandamus, or any other appropriate relief as may be necessary to enforce or correct a violation of the provisions of the Law or this Agreement. In order to revoke the License, the County shall provide to Licensee a written notice of revocation stating that the License will be automatically revoked if the default is not cured within ninety (90) days.

**9.3** The County shall have the right at any time upon 180 days notice (except in the case of an emergency in which case as much advance notice as is feasible shall be given), to extinguish this License Agreement upon a determination that such extinguishment is in the public interest. Licensee shall not be entitled to compensation for any such termination and such termination shall be construed to be a permissible removal of encroachments and not a taking of the Facilities, in whole or in part. In an emergency, the County acting through the County Executive may suspend the permission granted herein without any compensation being due or payable. Such suspension shall be limited to the extent feasible in the County's discretion.

## **10. MISCELLANEOUS PROVISIONS.**

**10.1** The License and the Facilities shall automatically transfer to any successors-in-interest of Licensee provided that such successors are fully bound by the obligations of Licensee and provisions hereof. Licensee shall provide the County with written notice of such transfer at least 30 days prior to the effective date of the transfer. Licensee shall provide all information and documents reasonably requested by the County relating to the assignment or transfer.

**10.2** Licensee understands that this Agreement does not provide Licensee with exclusive use of the Subject Public Right-of-Way and that the County shall have the right to permit providers of telecommunications systems and other utilities to install equipment or devices in the Subject Public Right-of-Way. To the extent permitted under applicable Law, to the extent feasible and at no cost or expense to the County, the County will require any such utility to use the utility sleeves provided by Licensee for the placement of such utilities.

**10.3** This Agreement contains the entire understanding between the parties with respect to the subject matter herein and supersedes all prior understandings and agreements, whether written or oral. There are no representations, agreements or understandings (whether oral or written) between or among the parties relating to the subject matter of this Agreement which are not fully expressed herein.

**10.4** This Agreement may not be amended except pursuant to a written instrument signed by both parties.

**10.5** This Agreement shall be governed by and construed in accordance with the laws of the State of Maryland, without reference to its conflicts of law principles. In the event that suit is brought by a party to this Agreement, the parties agree that trial of such action shall be vested exclusively in the Montgomery County Circuit court in the state of Maryland.

**10.6** All exhibits referred to in this Agreement and any addenda, attachments, and schedules which may, from time to time, be referred to in any duly executed amendment to this Agreement are by such reference incorporated in this Agreement and shall be deemed a part of this Agreement.

**10.7** This Agreement is binding upon the successors and assigns of the parties hereto.

**10.8** Licensee acknowledges that the County may develop rules, regulations, and specifications that apply to the construction, reconstruction, installation, location, removal, reattachment, reinstallation, or relocation of the Facilities in the Public Right-of-Way, and such rules, regulations, and specifications, when finalized, shall govern Licensee's activities hereunder as if they were in effect at the time this Agreement was executed.

**10.9** It is expressly understood that the County shall not be construed or held to be a partner or associate of Licensee in the conduct of Licensee's business.

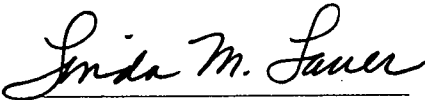
**10.10** In any case where the approval or consent of one party hereto is required, requested or otherwise to be given under this Agreement, such party shall not unreasonably condition, delay or withhold its approval or consent.

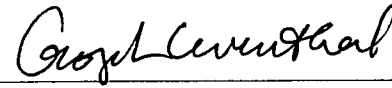
[SIGNATURE PAGE FOLLOWS]

THE PROVISIONS OF THIS AGREEMENT ARE  
AGREED TO AND HEREBY ACCEPTED THIS  
\_\_\_\_ DAY OF \_\_\_\_\_, 2006.

WITNESS:

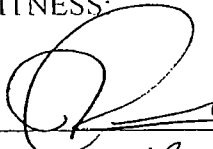
MONTGOMERY COUNTY, MARYLAND

  
Linda M. Lauer, CMC  
Clerk of the Council


By:   
George Leventhal, President  
Montgomery County Council

Date: Nov 28, 2006

WITNESS:

  
J. Pucciarini

1203 FIDLER LANE, LLC

By:   
Leith Wain  
managing member

Date: September 1, 2006

APPROVED AS TO FORM AND LEGALITY.

OFFICE OF COUNTY ATTORNEY

BY 

DATE 10/17/06

## **EXHIBIT A**

Location of Facilities  
[To be provided]

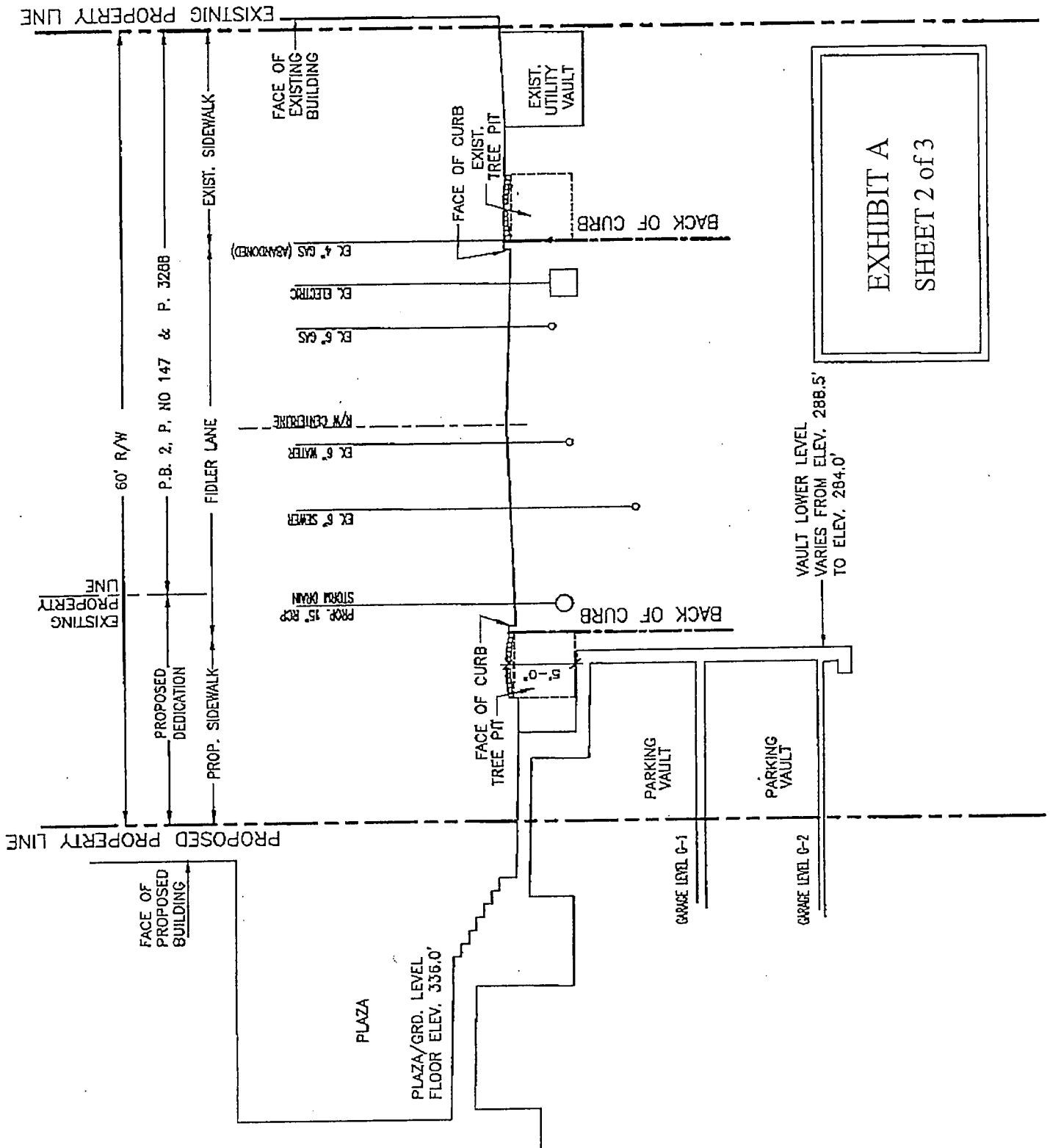


EXHIBIT A  
SHEET 2 of 3

# EXHIBIT A

## SHEET 2 of 3

